



AOR 2013-16

September 10, 2013

Lisa Stevenson
Deputy General Counsel
Federal Election Commission
999 E Street NW
Washington, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
2013 SEP 10 AM 9:49
OFFICE OF GENERAL
COUNSEL

RE: Advisory Opinion Request of PoliticalRefund.org

Dear Ms. Stevenson:

Pursuant to 2 U.S.C. § 437f, PoliticalRefund.org, a Virginia-based non-profit 501(c)(4) organization, requests an Advisory Opinion from the Federal Election Commission ("FEC") regarding proposed communications to, and interaction with, political committee contributors. PoliticalRefund.org seeks the FEC's approval, consistent with *FEC v. Political Contributions Data, Inc.*, 943 F.2d 190 (2d Cir. 1991), and with Advisory Opinions 1984-02 (Gramm), 1981-05 (Findley), and 2009-19 (Club for Growth), to engage in purely informational communications with contributors who contributed to specific authorized political committees informing them that: (a) they may request a refund of their contribution, and (b) they may use the tools provided by PoliticalRefund.org to make this request.

INTRODUCTION

PoliticalRefund.org was organized to provide individuals who contributed to authorized political committees the ability, at no cost, to request a refund from the candidate(s) to whom they contributed. Using publicly available FEC data, PoliticalRefund.org would like to contact campaign contributors, either by traditional postal service or via email, to provide them information about this free service. PoliticalRefund.org will emphasize that candidates are under no obligation to provide a refund; the organization simply facilitates a contributor's refund request.

PoliticalRefund.org intends to provide a convenient customizable online form letter that any individual may print, sign, and mail to a political committee. For interested users, PoliticalRefund.org would also offer a follow-up service, where PoliticalRefund.org would contact political committees on behalf of those individuals who made refund requests in hopes of facilitating those requests. Additionally, PoliticalRefund.org would display the aggregate number of people requesting refunds from political committees on its website, without in any way identifying contributors.

In order to fund its activities, PoliticalRefund.org plans to seek commercial sponsorship or, in the alternative, provide banner advertising on its website to sponsors. Any sponsorship would be clearly and prominently disclosed on the PoliticalRefund.org website. PoliticalRefund.org would not sell banner advertising to any candidate for federal office or any political committee.

PoliticalRefund.org does not operate for commercial purposes. PoliticalRefund.org will make only informative communications, which will not involve any solicitation of money, and PoliticalRefund.org will not encourage contributors to provide financial support to any candidate, cause, or other purpose.

PoliticalRefund.org will not solicit contributions on its website, nor will it charge a fee to users. PoliticalRefund.org will protect all identifying contributor information. Any lists compiled from FEC data will be used only once, solely for the purpose of sending a communication informing a contributor of his or her ability to request a refund. FEC data will not be retained by PoliticalRefund.org, nor will the organization make such data available to third parties or use the data for any commercial purpose. PoliticalRefund.org does not retain any user information.

FACTS

I. PoliticalRefund.org.

PoliticalRefund.org is a Virginia non-profit organization with a pending federal income tax exemption application under Section 501(c)(4) of the Internal Revenue Code. PoliticalRefund.org is a non-partisan organization that operates independently of any candidate, campaign, or any other political entity.

II. Proposed Communications.

PoliticalRefund.org's mission is to provide political campaign contributors a simple, user-friendly means to request a refund of their contributions. PoliticalRefund.org intends to focus on candidates whose dramatically shifting issue positions or scandals might prompt refund requests. For example, if a candidate switched political parties, such a situation may give rise to refund requests. See AO 2009-19 (Club for Growth). Based on such controversial actions or other occurrences of potential concern to contributors, PoliticalRefund.org will engage in a single communication with contributors who, according to FEC reports, contributed to that specific candidate. Unless a contributor affirmatively chooses to communicate further with PoliticalRefund.org, no contributor will be contacted more than one time per two-year election cycle with regard to the actions of any single candidate.¹

To carry out its mission, PoliticalRefund.org has established a website and two methods for contacting contributors, both of which will safeguard contributor data. Under the first method, PoliticalRefund.org would relay information about itself and its service via traditional mail by sending either a letter or a postcard to contributors whose information publicly available through the FEC website. Any data used for this purpose will be destroyed after its use,² which will prevent any further use of contributor data while permitting PoliticalRefund.org to send a single communication regarding a candidate directly to a contributor. In the second method, which will reduce the cost of communication and thus enhance speech if permitted by the FEC, PoliticalRefund.org would contract with a vendor to match contributor emails to the publicly available FEC data in a secure, confidential³ matching process. PoliticalRefund.org would

¹ If a contributor has contributed to multiple candidates whose dramatically shifting issue positions or other actions might prompt refund requests, PoliticalRefund.org may contact that contributor regarding each candidate, but never more than once regarding the same candidate.

² Similarly, should PoliticalRefund.org use a vendor to send such communications, PoliticalRefund.org will require the vendor to ensure it destroys this data as part of its contract with PoliticalRefund.org.

³ PoliticalRefund.org will obtain all contributor data from the FEC site, which lists publicly available information, including contributor names and addresses. PoliticalRefund.org will then engage a vendor to match this data with email addresses, where possible. The vendor will provide a single copy of this combined data to PoliticalRefund.org and then destroy all records of this data.



then relay information about itself and its service via email to these contributor email addresses and, upon sending the email, destroy the data. With either method, the communication will state that no candidate or committee is under any obligation to issue a refund.

To facilitate refund requests, PoliticalRefund.org will send a letter that includes a short explanation of PoliticalRefund.org's mission, its purpose for contacting the contributor, the PoliticalRefund.org website URL, and other relevant and permissible information. In place of this letter, if permitted by the FEC, PoliticalRefund.org will send a postcard containing the website URL and a shortened version of the above information. Once a contributor receives this information, the contributor will decide whether to visit the website and request a refund using PoliticalRefund.org's platform.

For those contributors whose email addresses may be ascertainable through the secure, confidential matching process, PoliticalRefund.org would like to send a personalized email to each contributor, which will include a link to the website and similar content to that described above. The website will provide information on how a contributor may request a refund, a clear statement that a candidate is under no legal obligation to provide refunds, and a link to a form that will populate a personalized letter. The contributors themselves will enter their own data into the form on the PoliticalRefund.org website. The form will then automatically populate a letter with this contributor-provided information, including the contributor's name, address, contribution amount, data pertaining to the political committee from which the contributor desires a refund, and other relevant information. A contributor would then send this letter to the committee from which he or she was requesting a refund. The data entered into the form will not be retained by PoliticalRefund.org.

PoliticalRefund.org may also offer contributors who elect to use its platform an opportunity to permit PoliticalRefund.org to follow up with the political committee regarding their refund requests. PoliticalRefund.org will not initiate contact with contributors concerning follow-up activities — the option will merely be presented when the contributor takes steps to make a refund request. The contributor's choice whether to accept or decline the offer is entirely voluntary. A contributor may also elect to cease all communications with PoliticalRefund.org.

Additionally, PoliticalRefund.org would like to publish on its website the aggregate number of people requesting refunds from specific authorized committees. This data will be collected to gauge the efficacy of PoliticalRefund.org's activities. The data will also provide contributors and the public with general information regarding political refund trends and information about particular authorized committees. This continually updated data will be purely numerical, and will not disclose any contributor's identifying information.

In addition, visitors to the website may see sponsorship advertising on the webpage. Requestors are aware of no regulations that would prevent PoliticalRefund.org from garnering sponsorship to fund the operations and activities of its website.

PoliticalRefund.org will neither solicit contributors for monetary contributions to fund its activities nor charge a fee to use its website. Contributors will not be able to make contributions on the website. At no point will the organization encourage anyone to contribute to a particular campaign, committee, or



political candidate. PoliticalRefund.org will not disclose the name of any contributor in the course of its activities, nor will it permit any candidate, PAC, or other entity engaging in primarily political activities to purchase banner advertising.

QUESTIONS PRESENTED

1. *May PoliticalRefund.org send a personalized letter with its website URL to contributors whose names and contact information were obtained in part from the FEC and securely matched to provide necessary additional mailing information?*
2. *To substantially reduce costs, may PoliticalRefund.org instead send a postcard with its website URL to contributors whose names and contact information were similarly obtained from the FEC and matched for full addresses?*
3. *To further reduce the cost of transmitting information, may PoliticalRefund.org instead send an email containing a link to its website to contributors whose names and contact information were similarly obtained from the FEC and matched for email addresses?*
4. *May PoliticalRefund.org send a personalized email containing computer code embedded in the individual contributor's link to the website, which would then pre-populate the form letter at the website with contributor's name and address information, making the user experience easier and more streamlined?*
5. *May PoliticalRefund.org offer those who respond to its communications the option of PoliticalRefund.org following up with their refund requests and communicating that information back to the responder?*
6. *Without disclosing the identifying information of any contributor, may the PoliticalRefund.org website display on its home page the aggregate number of persons who have requested a refund and the total dollar amount requested from any individual authorized committee and from all authorized committees through the PoliticalRefund.org system?*
7. *May the PoliticalRefund.org website sell banner advertising and other sponsorship opportunities on its website in order to pay the costs of maintaining the website?*

DISCUSSION

The FEC is required to publish for public inspection and copying any reports or statements filed with the FEC within 48 hours of its receipt. 2 U.S.C. § 438(a)(4). Anyone may access and use this publicly available information, so long as it is not used "for the purpose of soliciting contributions or for any commercial purpose." 2 U.S.C. § 438(a)(4). "Contributions" that cannot be solicited include political or charitable contributions. 11 C.F.R. § 104.15(b). But this prohibition does not foreclose all uses of contributor data: while solicitations and commercial uses are not permitted, regulations do permit

communicating this information in “newspapers, magazines, books or other similar communications.” 11 C.F.R. § 104.15(c).

In *FEC v. Political Contributions Data, Inc.*, the Second Circuit defined the scope of communications for which FEC contributor data may be used. 943 F.2d 190 (2d Cir. 1991). The court reasoned that the prohibition on solicitation and commercial use was intended to protect political contributors from unwanted vendors of products such as “cars, credit cards, magazine subscriptions and cheap vacations.” *Id.* at 197. Thus, other communications with contributors were permissible if they satisfied the court’s two-pronged test: (1) the FEC data was used for a communication similar to that of a newspaper, magazine, or book, and (2) if the principle purpose of the communication was non-commercial. *Political Contributions*, 943 F.2d at 194-95. Considering the first prong, the court held that a communication is sufficiently similar to a newspaper, magazine, or book if the communication does not infringe upon the privacy of contributors (by encouraging solicitations), and if the communication is designed in a manner that furthers First Amendment values such as “uninhibited, robust, and wide-open” debate on public issues. *Id.* at 195-96 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Using contributor data survives the second prong if the data is used for non-commercial, informational purposes that pose “little, if any, risk” of solicitation or harassment to contributors. *Id.* at 197.

In accordance with *Political Contributions* and original legislative intent, the FEC has conclusively established that purely informational, non-commercial communications are permissible under the Federal Election Campaign Act. Indeed, the prohibition on using contributor data for commercial purposes does not “foreclose the use of this information for other, albeit political, purposes, such as correcting contributor misperceptions.” AO 1984-02 (Gramm).

Accordingly, a PAC can use contributor data to send contributors information about a candidate’s political party switch—and to facilitate refunds from the candidate to the contributors. AO 2009-19 (Club for Growth). In Club for Growth, the FEC noted that the PAC was not using information for commercial purposes. *Id.* Further, the PAC would contact contributors only to inform them that Senator Arlen Specter had decided to switch parties, and that he had a policy of issuing refunds upon request. *Id.* Such a “limited use” of contributor information did not violate the solicitation and commercial use prohibition in 2 U.S.C. 438(a)(4). *Id.* at 5. Similarly, when a PAC shares a confusingly similar name, a candidate’s authorized campaign committee can permissibly write letters to contributors to clarify that it is the single authorized committee. AO 1984-02 (Gramm). And the authorized committee can include in its mailing a suggestion that the contributor ask for a refund of his or her contribution to the unauthorized committee. *Id.* A candidate may also send a letter to contributors to dispute defamatory charges. AO 1981-05 (Findley).

These Advisory Opinions are consistent with *Political Contributions*, as the permitted communications were purely informational and were not repetitive; thus, the contributors’ privacy rights were not infringed. Further, the acceptable communications all encouraged discourse and debate on truthful issues regarding political candidates—public issues of particular importance to contributors. As the communications were informational, there was no risk of repeated contributor solicitation or harassment, and no impermissible commercial purpose.

Concordantly, the FEC has prevented organizations from using contributor data in a manner inconsistent with *Political Contributions* and Congressional intent. A communication that presents a likelihood of repeated, intrusive contact with contributors is thus prohibited. In Advisory Opinion 2003-24 (National Center for Tobacco-Free Kids), the FEC ruled that the non-profit National Center for Tobacco-Free Kids (“NCTFK”) could not use FEC contributor data, even for non-fundraising purposes, to reach out to political contributors in order to inform them of various congressional activities, or to encourage them to reach out to members of Congress. The proposed NCTFK communications presented “the possibility of repetitive and intrusive communications to contributors” that Congress originally sought to prevent. See 117 Cong. Rec. 30,057 (daily ed. Aug. 5, 1971) (statement by Senator Bellmon). Thus, NCTFK failed to survive the second prong established by the *Political Contributions* test, because the organization’s attempted communications posed a significant risk of contributor solicitation and harassment.

Conversely, PoliticalRefund.org’s proposal to send a letter, postcard, or email to a contributor easily survives the two-pronged *Political Contributions* test and also conforms with the FEC’s Advisory Opinions in Gramm, Findley, and Club for Growth. First, under the test’s first prong, regardless of the medium by which PoliticalRefund.org sends its literature, doing so will not infringe upon the privacy of contributors, and the communication does not make or encourage solicitations. Only the individual contributor will view the personalized letter, and PoliticalRefund.org will not disclose contributor information to anyone other than that contributor. Accordingly, any risk of a contributor’s private information becoming public by way of PoliticalRefund.org’s activities is virtually non-existent. Moreover, PoliticalRefund.org’s contact with contributors, whether by letter, postcard, or email, will in no way encourage solicitations. Instead, PoliticalRefund.org merely aims to encourage political speech by notifying a contributor of a specific issue particularly relevant to his or her prior political contribution, then facilitating a refund request. This purely informational communication will be made only when an issue of specific importance to a candidate’s contributors arises, and PoliticalRefund.org will communicate with a contributor only once—at most—regarding any single candidate per election cycle. Just as Club for Growth contacted contributors when former Senator Arlen Specter made a political party switch, PoliticalRefund.org would similarly contact a candidate’s contributors to address a specific controversy that may reasonably prompt the contributor to request a refund. Accordingly, PoliticalRefund.org aims to further First Amendment values in advancing the flow of information and encouraging robust debate on today’s most pressing political issues.

PoliticalRefund.org also successfully fulfills the second prong of *Political Contributions*, since its communications have a non-commercial purpose: PoliticalRefund.org will use FEC data for purely informational purposes that pose no risk of solicitation or harassment to contributors. PoliticalRefund.org’s goal is to provide campaign contributors with information of public concern and the means to request refunds. Accordingly, the communications have no commercial purpose, and the organization provides this service at no cost. Further, PoliticalRefund.org’s communications will not encourage or invite political contributions—or any other form of financial support.

Additionally, under the second prong, the communications here pose no risk of repeated contributor harassment: PoliticalRefund.org will contact a contributor regarding his or her contributions to a specific

candidate only one time per two year election cycle. Such contact is triggered by rare events, which will implicate very few candidates. Any further communications with contributors occur at the contributor's own volition, as he or she must affirmatively take advantage of the option to have PoliticalRefund.org follow up with campaigns on the contributor's behalf.⁴ This contact is akin to that which the FEC found acceptable in *Gramm, Finley, and Club for Growth*, and in no way presents the risk of repeated, invasive contributor contact that Congress envisioned (and that the FEC found unacceptable) in *NCTFK*. 2 U.S.C. § 438(a)(4). Importantly, as in *Club for Growth*, PoliticalRefund.org will safeguard all contributor data — by destroying it once used — so there is no possibility that contributor information will be used for an impermissible purpose. *Id.*

Displaying the aggregate number of persons who have requested a refund (as well as the total dollar amount requested from candidates) should also be permissible under the *Political Contributions* test. By displaying merely numerical data, PoliticalRefund.org will protect contributors' privacy. The organization merely intends to encourage debate on public issues and provide useful information. Since contributors' names and identifying information remain private, there is no possibility of their solicitation or harassment. Displaying these numbers on the PoliticalRefund.org website is consistent with previous Advisory Opinions, as doing so is a type of communication that does not even touch on the sort of repetitive solicitation or harassment Congress contemplated when it adopted Section 438(a)(4).

Offering refund-requestors the opportunity for PoliticalRefund.org to follow up on their refund requests also appears to be permissible under *Gramm, Finley, and Club for Growth*. As discussed, Section 438(a)(4) is aimed at preventing solicitation and harassment. If a contributor, on his or her own, asks an organization to follow up on his or her behalf (and may any information received), such activity is clearly not prohibited under the plain text of Section 438(a)(4) and is encouraged by the rationale underlying the law.

Lastly, it appears that PoliticalRefund.org can sell banner ads to other non-political entities, and the organization can also likely offer paid sponsorship in order to pay for costs associated with maintaining the website. Any dealings between PoliticalRefund.org and sponsor entities will not involve the exchange of FEC contributor data, nor will dealings between PoliticalRefund.org and sponsors involve any commercial activities related to the acquisition of FEC data. Any corporate sponsorship would be prominently disclosed on the PoliticalRefund.org website. Furthermore, PoliticalRefund.org will not sell banner advertising to any candidate for federal office or to any political committee.

CONCLUSION

PoliticalRefund.org proposes to make communications that it believes conform to applicable law. The proposed communications are very similar to those permitted in prior FEC Advisory Opinions, and are well within the framework established by the courts. PoliticalRefund.org intends to notify contributors of

⁴ If a contributor opts against checking the box permitting future contact with respect to a refund request, PoliticalRefund.org will not contact that person again regarding the same candidate, making the potential for repetitive or intrusive contact minimal. Moreover, as noted, a contributor may elect not to receive any further communications from PoliticalRefund.org.



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an opportunity to seek refunds as specific issues relating to candidates arise. PoliticalRefund.org will neither engage in any commercial solicitations, nor will it contact contributors more than a single time regarding the same issue. Accepting clearly disclosed, non-political sponsorship—or selling web-based banner advertising—does not appear to conflict with any prohibitions on commercial solicitation under federal election law. For these reasons, we urge the FEC to approve the proposed communications.

Respectfully Submitted,

Dan
Backer, Esq.

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RE: Request for Advisory Opinion on behalf of PoliticalRefund.org
 Dan Backer
 to:
 JWaldstreicher
 09/20/2013 08:56 AM
 Cc:
 paulk
 Hide Details
 From: "Dan Backer" <DBacker@DBCapitolStrategies.com>
 To: <JWaldstreicher@fec.gov>,
 Cc: <paulk@coolidgereagan.org>

Joanna,

For convenience, please find our answers below. Also, please note above the correct address for Paul Kamenar of the Coolidge-Reagan Foundation (I inadvertently omitted the "k").

Regards,

Dan Backer, Esq.
 202-210-5431 office
 202-478-0750 fax

DB Capitol Strategies PLLC

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From: JWaldstreicher@fec.gov [mailto:JWaldstreicher@fec.gov]
Sent: Thursday, September 19, 2013 5:56 PM
To: dbacker@dbcapitolstrategies.com
Cc: paul@coolidgereagan.org
Subject: Request for Advisory Opinion on behalf of PoliticalRefund.org

Dear Mr. Backer:

In our telephone conversation on September 18, 2013, you provided us with additional information regarding PoliticalRefund.org's request for an advisory opinion. We have set out below our understanding of some of that information. Please either confirm the accuracy of these statements or correct them.

1. For practical reasons, PoliticalRefund.org will focus exclusively on candidates who won their respective elections and are now incumbents, rather than trying to track and evaluate the positions of all candidates. PoliticalRefund.org's directors will decide whether to target a particular officeholder's contributors, although such efforts may also be suggested by others, including paying "sponsors" as described in #3 below.
[DB] This is correct.

2. Although PoliticalRefund.org will contact a contributor only once for contributions made to any one candidate in an election cycle, PoliticalRefund.org may contact a contributor who has contributed to more than one candidate as many times as the number of candidates to whom that individual contributed in the election cycle. In other words, the number of unsolicited contacts that PoliticalRefund.org makes to any given contributor could depend on the number of candidates to whom that individual contributed in the election cycle. Thus, if an individual contributed to six different candidates during an election cycle, and each candidate won his or her

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respective election, then PoliticalRefund.org could make up to six unsolicited contacts to that individual -- one for each candidate.

[DB] This is technically correct though perhaps it could be worded more simply that "PoliticalRefund.org will only make an unsolicited contact to a given contributor up to once per election cycle with respect to each candidate that contributor has contributed to, and not more than once per candidate contributed to."

3. PoliticalRefund.org will sell banner advertising on its website and will seek financial sponsorship of its refund efforts. It will sell banner advertising and sponsorship only to entities that are not candidates or political committees, such as 501(c)(4) organizations. Sponsors will be identified as such in the communications that they sponsor. PoliticalRefund.org will charge advertisers and sponsoring organizations only the amount necessary to cover its costs, and will not charge a markup or make a profit.

[DB] PoliticalRefund.org has applied for, and is operating as, an organization exempt from taxation under Section 501(c)(4) of the IRC; accordingly it does not seek to or intend to make "profit." Otherwise, this is essentially correct with the caveat that sponsorship of specific emails will be priced "at cost" with respect to that email, while banner advertisement on the website will be priced with respect to the administrative costs of the website, so it cannot properly be described as "at cost".

4. Question 1 of your letter requesting an advisory opinion refers to a "personalized letter" that PoliticalRefund.org may send to contributors to inform them of their ability to request refunds. The letter may be personalized by including: the recipient's name and address; the name of the officeholder to whom the recipient made a contribution; and the amount of the contribution. This information would also be included in postcards that PoliticalRefund.org may send to contributors, per Question 2 of your letter.

[DB] This is correct.

5. Persons contacted by PoliticalRefund.org will be able to indicate on PoliticalRefund.org's website whether they would or would not like PoliticalRefund.org to contact them again with respect to the same contribution or refund request. A person's failure to indicate a preference will result in PoliticalRefund.org not contacting that person again regarding the same contribution or refund request. As currently configured, PoliticalRefund.org's technology will not allow a person to opt out of any future contact by PoliticalRefund.org with respect to any other contribution or refund request, because PoliticalRefund.org will not maintain any of the data entered on its website unless the person requests follow-up communications from PoliticalRefund.org.

[DB] This is correct.

6. PoliticalRefund.org will not retain any of the information that persons enter into the refund request form on PoliticalRefund.org's website and will not use the information for any purpose other than populating the refund request letter, unless the person requests follow-up communications from PoliticalRefund.org. PoliticalRefund.org will not sell any of the information that is entered on its website.

[DB] This is correct.

We would appreciate your response by email. Your response may be considered to be part of your advisory opinion request; if so, it will be posted as such on the Commission's website.

Yours,
Joanna Waldstreicher
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Federal Election Commission
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